In The

Supreme Court of the United States

October Term, 1976

No. 76-1223

RICHARD A. SPRAGUE,

Petitioner,

vs.

F. EMMETT FITZPATRICK,

Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, filed on January 9, 1976, dismissed the complaint; said opinion is now reported at 412 F. Supp. 910 (E.D. Pa. 1976). The Court of Appeals for the Third Circuit, treating the District Court's order as the entry of summary judgment, filed an opinion affirming said order on December 6, 1976; said opinion is now reported at 540 F.2d 560 (3d Cir. 1976).

JURISDICTION

Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. §1254(1).

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the First Assistant District Attorney of the City of Philadelphia has a constitutionally protected right to publicly criticize the integrity and policies of the District Attorney, where a close, harmonious and loyal relationship between the two is essential to the effective administration of the District Attorney's Office.

COUNTER-STATEMENT OF THE CASE

Respondent is and was, at all times pertinent hereto, the duly elected District Attorney of Philadelphia. As such, after his investiture to office in January 1974, he was charged with responsibility of administering an office employing 136 to 166 assistant district attorneys who prosecuted alleged violations of the criminal laws of the Commonwealth of Pennsylvania.

Under Pennsylvania law, all assistant district attorneys are appointed by and serve at the pleasure of the elected district attorney.[1] In January 1974, respondent appointed petitioner to serve as his First Assistant.

1. *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482, 307 A.2d 884, 891 (1973).

In December 1974, respondent dismissed petitioner from his position. This lawsuit, based upon the Civil Rights Act of 1871, 42 U.S.C. §1983, and its concomitant jurisdictional section, 28 U.S.C. §1343, followed. The District Court, based upon the pleadings together with affidavits filed by both parties, "dismissed" the complaint. The Court of Appeals, treating the procedural posture (absent objection from petitioner) as on appeal from the entry of summary judgment, affirmed.

Accordingly, all disputed facts must be viewed in a light most favorable to petitioner; facts presented by respondent, but not denied by petitioner, will be considered equally true. *E.g., Morrison v. Walker*, 404 F.2d 1046, 1048-49 (9th Cir. 1968).[2]

In Philadelphia, the First Assistant District Attorney plays an integral part in the administration of the District Attorney's Office. He assists the District Attorney in formulating policy, sees that that policy is effectively carried out by the other assistant district attorneys, serves in the District Attorney's position when the latter is out of the City, and must always be available for consultation with the District Attorney. He is, as such, the District Attorney's "alter ego"; in the Third Circuit's words, "the First Assistant is the District Attorney's second-in-command" (Appendix A to Petition, at 2a). Not disputed by petitioner was respondent's statement that the "responsibilities of the First Assistant District Attorney necessitate a close and

2. While the Petition for Writ of Certiorari makes repeated reference to "concessions" and "undisputed facts," respondent notes that it is only because of the procedural posture of this case that such "concessions" are necessarily made.

effective working relationship between him and the District Attorney" (App. 38).[3]

Nevertheless, soon after his appointment it became apparent that petitioner disagreed with respondent's determination of nearly every major policy of the District Attorney's Office. Petitioner complained that the District Attorney was permitting staff assistants to deal directly with him, rather than through the First Assistant (App. 24). Petitioner opposed the policy of permitting staff assistants to negotiate guilty pleas themselves (App. 25). He also opposed respondent's stated philosophy that sentencing was a judicial function, and that unsolicited sentence recommendations were not to be given by assistant district attorneys (App. 38); indeed, it was in major part the dispute over this issue that led to the so-called Nardello matter.

There was published on December 4, 1974, a first-page story in *The Philadelphia Inquirer,* entitled "Sprague Disputes D.A.'s Version of Nardello Case" (App. 44-45). While close examination of the article reveals that, in large part, the "disputed" statements were largely different interpretations of events,[4] the "interview" and responses thereto were couched in

3. The reference to "App." is to the Appendix to the briefs filed in the United States Court of Appeals for the Third Circuit.

4. The five statements of respondent which petitioner labelled "not true" included a single out-of-context sentence which seemed to indicate that Nardello had been sentenced long before respondent took office; a disagreement whether delaying the disposition of post-trial motions for 4½ years in a receiving stolen goods case makes that case "old" and "infirm";

(Cont'd)

such terms that *The Inquirer* reported that petitioner had stated that respondent "has not told the truth" (App. 44), and *The Daily News* quoted petitioner as saying "his boss . . . lied" (App. 46). From the same interview, *The Evening Bulletin* concluded that petitioner had brought "into the open a rift that has been growing since F. Emmett Fitzpatrick took charge" (App. 47).

Before respondent could speak with his First Assistant, petitioner gave another interview in which he stated that it was his job to "fight for the public" against the District Attorney, and that the District Attorney provided a "total lack of supervision of what the individual assistants are doing" (App. 51).

According to petitioner's affidavit, respondent told him that "my effectiveness as First Assistant District Attorney ended the moment I gave the interview to the Inquirer" (App. 33). In respondent's words, "[i]t was obvious to me, as it was to Mr. Sprague when he made the statements . . ., that Mr. Sprague had no intention of continuing even a facade of cooperation with me, and that his effectiveness to my office was irreparably destroyed" (App. 42).

Respondent accordingly dismissed petitioner from his position on December 5, 1974.

(Cont'd)

different statements made by another attorney to respondent and petitioner on two different occasions; and a dispute over whether it is the role of the district attorney or of the court to determine what sentence is proper. The only true dispute was over the details of an unwitnessed conversation between petitioner and respondent.

The District Court found it "beyond question" that petitioner's statements "would interfere with harmonious relationships with his co-workers" and that they had "totally precluded any future working relationship between him and the defendant" (Appendix B to Petition, at 26a); indeed, the court noted that petitioner "must have known that the inevitable result of his statements — whether they be true or false — would be abrupt termination of his employment" (*id.* at 28a).

Similarly, the Third Circuit found that petitioner's statements were such that "the employment relationship between employee-speaker and employer-target [was] completely undermined" (Appendix A to Petition, at 10a).

REASONS FOR DENYING THE WRIT

Summary of Argument

None of the reasons for granting a writ of certiorari, at least as enumerated in Rule 19(b) of the Rules of the Supreme Court of the United States, is applicable to this case. No conflict among decisions of courts of appeals can or has been cited. No court has, since 1968, considered the constitutional criteria applicable in this area to be unsettled. The decisions below do not conflict with any decisions of this Court. Nor has there been any departure from the accepted and usual course of judicial proceedings.

I.

This Court's decisions have established a balancing standard by which to determine whether utterances of public employees are constitutionally protected under the First Amendment.

In *Pickering v. Board of Education,* 391 U.S. 563 (1968), the Court was confronted with the dismissal of a public employee (a teacher) motivated by statements he had made at a public hearing, which statements and hearings were both unrelated to his employment. In holding that such a dismissal violated the employee's First Amendment rights, the Court noted that there was a significant difference between the State's right to regulate the speech of its employees and its right to regulate the speech of its citizens in general — that in the former situation, a balance was required to be struck between the employee's rights as a citizen and those of the State "in promoting the efficiency of the public service it performs through its employees." *Id.* at 563.

That such a balancing process favored giving constitutional protection to the employee's speech in *Pickering* was based upon these considerations:

> "The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's

> employment relationships with the Board, and to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."

Id. at 569-70. To underscore these considerations, the Court noted, *id.* at 570 n.3, that while it intimated no view concerning how it would resolve any specific case, "significantly different considerations would be involved" where the employee-employer relationship was of such a "personal and intimate nature" that public forms of criticism "would seriously undermine the working relationship between them."

Although petitioner has suggested that the *Pickering* Court thereby left unresolved the issue whether the balancing process may leave unprotected certain types of employee speech,[5] no court has ever had similar doubts. Indeed, this Court has repeatedly treated the *Pickering* language, while technically "dictum" (since it was not necessary to the decision), as a holding of continuing validity. *E.g., Mt. Healthy City School District v. Doyle,* 97 S. Ct. 568, 574 (1977).

Six Justices so concurred in *Arnett v. Kennedy,* 416 U.S. 134 (1974), where a federal employee, after accusing the regional

5. Respondent understands that whether an employee's speech be "true," as procedurally petitioner's statements must now be considered, or false is not of constitutional significance, so long as the statements are neither knowingly nor recklessly false.

director of his agency of attempted bribery,[6] was discharged under an Act permitting discharge "only for such cause as would promote the efficiency of the service." Mr. Justice Rehnquist, writing a plurality opinion (in which he was joined by the Chief Justice and Mr. Justice Stewart) announcing the judgment of the Court, held:

> "The phrase 'such cause as will promote the efficiency of the service' . . . is without doubt intended to authorize dismissal for speech as well as other conduct. *Pickering v. Board of Education* [citation omitted] makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment: [quotation omitted]. . . .
>
> . . .The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. Indeed the Act is not directed at speech as such, but at employee behavior,

6. Because the appeal was from a summary judgment granted for the employee, the Court was procedurally required to accept the director's denials of the attempted bribery charge as true. However, there is no indication in any of the opinions that any Justice considered the employee's speech to be unprotected because it was knowingly or recklessly false.

> including speech, which is detrimental to the efficiency of the employing agency. We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech. . . ."

Id. at 160, 162. Accordingly, the dismissal of the employee in the face of his charges "would infringe no constitutional right." *Id.* at 162. Three other Justices joined the plurality opinion on this issue. *Id.* at 164 (Powell, J., joined by Blackmun, J., concurring in part); *id.* at 177 (White, J., concurring in part).

For these reasons, respondent suggests that the issue involved in this specific case is not unresolved by the decisions of this Court.

II.

The court below properly applied the *Pickering* balancing test.

When Mr. Justice Marshall spoke for the Court in *Pickering v. Board of Education, supra,* he recognized that certain situations might arise where some of the legitimate interests of the State might directly conflict with an employee's unfettered speech. Not only are some of those State interests present in this case, but every interest identified in *Pickering* was violated by petitioner's conduct.

The statements directly challenged the integrity of petitioner's immediate superior, a person with whom petitioner

was required to have daily contact. The ability of that superior to maintain discipline was therefore directly challenged, for petitioner was stating to the entire District Attorney's staff (as well as to the public) that the respondent could not be trusted; at the same time, the statements obviously undercut the harmony of coworkers.[7] Petitioner's and respondent's working relationship required close and daily dealings; it required loyalty; and it required confidence. All three requirements to the proper functioning of the office were also destroyed by petitioner's conduct. Finally, "the personal and intimate nature" of the working relationship necessitated between them was not only "seriously" but irrevocably undermined by petitioner's conduct.

Respondent believes that both lower courts properly recognized that the State cannot be required to conduct its business in chaos. Where that chaos is caused by the deliberate conduct of one of its employees, and where there can be no question that the State cannot properly function in the face of such chaos, the result of the balancing test described in both *Pickering* and *Arnett* mandates that the State be permitted to protect itself. And the only measure available to the State in this case was the dismissal of petitioner.[8]

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7. Among the undenied portions of respondent's affidavit was the assertion of his right to make decisions concerning policy, rather than have them made by the First Assistant District Attorney as had been petitioner's practice under a prior administration (App. 38a). While petitioner's first affidavit criticized this practice (App. 24-25), his reply affidavit asserted that he had been prepared to follow this policy (App. 66).

8. That petitioner himself recognized that respondent would have no other choice is not only evidenced by his pre-dismissal statements (App. 51), but by his post-dismissal conduct as well (*e.g.*, App. 59). Notably, petitioner has not sought reinstatement, back-pay or loss of earnings in this action.

III.

There is no conflict among courts of appeals concerning the application of *Pickering* to this case.

That petitioner's claim of conflict among courts of appeals lacks citation to any circuit court opinion is understandable, for there is no conflict. There is no court of appeals which has not recognized the balancing test set forth in this Court's opinions, nor is there any court of appeals which has held that an employee's speech which completely undermines the effectiveness of his working relationship with his employer is protected.

Even the two authorities cited as supporting petitioner's assertion are inapposite. In *Hirsch v. Green*, 368 F. Supp. 1061 (D. Md. 1973) (Petition, at 20-22), the defending employer made no contention that the "public speech" (testimony before a grand jury) had any disruptive effect (contending instead that the dismissal resulted from other conduct), and thus *Pickering* was not discussed and only tangentially mentioned. 368 F. Supp. at 1064 n.1. The cited student comment[9] follows that portion quoted in the Petition (at 23-25) with the observation that the "foregoing decisions show some degree of consistency, but also indicate that each case is decided on its own merits and on its own peculiar facts." Comment, note 9, *supra* at 394.

Nor can support be found for petitioner's assertion that this case represents the first instance in which a "completely truthful"

9. Comment, 44 *U.M.K.C. L. Rev.* 389 (1976).

statement has supported a dismissal because of the disruptive nature of the comment.[10] In *Smith v. United States*, 502 F.2d 512 (5th Cir. 1974), a psychologist treating patients in a Veterans Administration psychotherapeutic ward insisted upon his right to wear a peace pin; while this represented a "truthful" expression of his opinion, his dismissal was nevertheless affirmed because the wearing of the pin interfered with the discharge of his duties and responsibilities. In *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), a civilian language instructor accurately told his foreign military students of the religious discriminations he had suffered in the United States; the court found that such comments interfered with the successful completion of the school's assigned task. *Accord, e.g., Phillips v. Adult Probation Dep't.*, 491 F.2d 951 (9th Cir. 1974) (probation officer's "truthful" expression of support for well-known fugitives from justice); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) (truthfully expressed criticism of college administration's policies); *Duke v. North Texas State Univ.*, 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973) (same); *Ferguson v. Thomas*, 430 F.2d 852, 859 (5th Cir. 1970). And, as noted above, most cases find no need to determine the factual issue of truthfulness, since both accurate

10. While petitioner is entitled to the procedural presumption of the accuracy of his statements, respondent has found no case in which any distinction has been made between totally truthful (or accurate) statements and those containing inaccuracies that did not represent knowing or reckless falsehoods. Nor has respondent found any case employing the *Pickering* balancing process where the resolution was governed by a finding of knowing or reckless falsehood. In other words, in all post-*Pickering* cases, relative accuracy has not been a determinative issue.

and inaccurate statements (if not knowingly or recklessly false) are treated the same under the Constitution. *E.g., Arnett v. Kennedy, supra; Roseman v. Indiana Univ.*, 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976).

In sum, there is no decided case from any circuit whose holding is contrary to the result reached by the Third Circuit in this case, nor is there even a reported decision whose language suggests that a different result would have been reached had the facts of this case been presented to any other federal court.

CONCLUSION

For the foregoing reasons, respondent respectfully suggests that the petition for writ of certiorari should be denied.

Respectfully submitted,

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